**SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW**

**[2026] SC GLA 120**

GLW-A878-25

JUDGMENT OF SHERIFF S REID

in the cause

DAVID ROBERTSON

Pursuer

against

ADVANTAGE INSURANCE COMPANY LIMITED

Defender

**Pursuer: Dingley, advocate; Jones Whyte Law, Glasgow**
**Defender: Black, advocate; Horwich Farrelly, Glasgow**

GLASGOW, 10 November 2026

The sheriff, having resumed consideration of the cause:

1. Repels the pursuer's preliminary plea (plea-in-law number 3);

2. Sustains the defender's second preliminary plea (plea-in-law number 2) to the extent of excluding from probation the pursuer's *esto* averments in Article 4 of condescendence, lines 87 to 90 (beginning with the words "*Esto* the contract is deemed to be unenforceable…" and ending with the words "…reasonable hire charge of £180 per day plus VAT");

3. *Quoad ultra* Allows parties a proof before answer of their respective remaining averments, restricted to issues of causation and quantum (including the enforceability of the credit hire agreement) in respect that liability is admitted, reserving the defender's first preliminary plea (plea-in-law number 1);

4. Assigns 18 February 2027 at 10.00am as a diet of proof before answer therefor;

5. Directs that the said diet of proof before answer shall proceed, in person, within Glasgow Sheriff Court, Sheriff Court House, Carlton Place, Glasgow;

6. Ordains parties to lodge in process, within 6 weeks of today's date, all productions to be founded upon, and lists of all witnesses to be called, at the said diet of proof before answer;

7. Ordains parties to lodge in process, within 8 weeks of today's date, signed witness statements of all witnesses whom the parties propose to call at the said diet of proof before answer; Orders and Directs that the content of each such statement shall constitute the evidence-in-chief of the signatory thereto; SUBJECT TO such supplementary examination-in-chief, cross-examination and re-examination as may be allowed by the court; UNDER RESERVATION MEANTIME of all issues of competency, relevancy and admissibility of the content thereof; and UNDER DECLARATION that, except with leave of the court, a party shall not be allowed to call a witness to testify at the said diet of proof before answer unless a signed witness statement of that witness has been so lodged;

8. Orders and Directs that, except with the prior leave of the court, no part of any such witness statement (whether in draft or otherwise) shall be disclosed to any other person who is due to give evidence at the said diet of proof before answer; meantime,

9. Reserves *sine die* the issue of the expenses of the debate.

**NOTE**

**Summary**

[1] This is an action of damages founded upon negligence. With one exception, the circumstances are unremarkable.

[2] The defender's insured collided with the pursuer's stationary vehicle. The pursuer's vehicle was damaged. It was put in for repair.

[3] The pursuer complains that he lost the use of his car while it was being repaired. He claims he needed to hire a replacement vehicle. But he says he was impecunious. So, he hired a replacement vehicle under a credit hire agreement from a credit hire company rather than from a conventional car hire company. In this action, he seeks damages for one head of loss only: the hire charges allegedly "incurred" under the credit hire agreement for a 29-day period of hire. The credit hire charges (at a daily rate of £180 plus VAT) total £6,264, which is the sum sued for.

[4] Liability is admitted. Causation and quantum are in dispute.

[5] An unusual specific line of defence is also advanced to the effect that the credit hire agreement, on which the single head of loss is based, is "regulated" under the Consumer Credit Act 1974; that the third party credit hire company (Call Robert Hire Drive Ltd, hereinafter referred to as "Call Robert") is not authorised by the Financial Conduct Authority ("FCA") to enter into such regulated consumer hire agreements; as a result, under statute, the credit hire agreement is said to be unenforceable against the pursuer; therefore, in law, no liability has been "incurred" by the pursuer to the third party; therefore, no "loss" has been sustained by the pursuer and the action should be dismissed.

[6] The pursuer denies (within its general denial averment) that Call Robert is not so authorised by the FCA. In addition, the pursuer avers that, *esto* the credit hire agreement is unenforceable (which is denied), damages should nevertheless be awarded for loss of use of his vehicle for the 29-day period based on a so-called "reasonable hire charge" (again, said to be £180 per day plus VAT, equating to £6,264).

[7] The action called before me at a debate on the parties' preliminary pleas.

[8] For the reasons explained more fully below, I have repelled the pursuer's preliminary plea to the relevancy and specification of the defender's averments regarding the unenforceability of the credit hire agreement. I have sustained the defender's second preliminary plea to the relevancy of the pursuer's *esto* averments and excluded those averments from probation. *Quoad ultra* I have allowed parties a proof before answer on all issues of causation and quantum (including the enforceability of the credit hire agreement), reserving the defender's first preliminary plea.

[9] To summarise my reasoning, firstly, the alleged unenforceability of the credit hire agreement, if proved, is a relevant defence to the principal head of loss in this action. In simple terms: (i) if, on a proper construction, the credit hire agreement founded upon is a regulated "consumer hire agreement"; and (ii) if Call Robert (the credit hire company) is indeed not authorised, under statute, to enter into that type of regulated agreement (there being no averments by the pursuer that it is exempt); then (iii) the credit hire agreement will be unenforceable against the pursuer, by virtue of the "general prohibition" in section 19 of the Financial Services and Markets Act 2000 ("FSMA 2000"); therefore, (iv) the pursuer will, in law, have "incurred" no liability for any hire charges thereunder; and, accordingly, (v) the pursuer will have suffered no loss (of the kind primarily averred) (*Dimond* v *Lovell* [2002] 1 AC 3834).

[10] Secondly, however, the merit of this primary line of defence cannot be determined at debate because it is dependent on a series of factual propositions some of which are disputed and require evidence at proof. Most obviously, on the face of the pleadings, a sharp factual dispute arises as to whether Call Robert is actually authorised by the FCA to enter into regulated consumer hire agreements. Disappointingly perhaps, that simple factual issue was not a matter of agreement or concession at debate. Therefore, evidence

will be required at proof on at least this component issue of the primary defence. (Conceivably, an adjudication might be made capable of being made at a summary decree motion on this and other technically disputed factual issues, but no such motion was advanced before me.)

[11] In contrast, thirdly, the pursuer's *esto* claim for loss of use (sounding in an award of general damages for inconvenience) is irrelevant. By his own averments, the pursuer *did* have use of a vehicle (the replacement hire car) throughout the 29-day period. There is no suggestion in his pleadings that the replacement car was not equivalent, in any material respect, to his damaged vehicle. No other inconvenience is averred. Therefore, *ex facie* the pursuer's own averments, he has suffered no "loss of use" of a vehicle during the 29-day period. The pursuer cannot have his cake and eat it. He cannot have use of a replacement (equivalent) vehicle and still claim damages for loss of use of a vehicle during the same period.

**The pleadings**

[12] The pleadings are brief. The pursuer avers that on 10 October 2023, without warning, a vehicle driven by the defender's insured collided with the pursuer's stationary motor vehicle causing damage (Article 3). The accident was caused by the fault and negligence of the defender's insured at common law (Article 5). Liability is admitted by the defender for the purposes of the action (Answers 3 and 5).

[13] The pursuer avers that his motor vehicle was damaged in the accident; that he lost the use of the vehicle as a result of the damage; that he needed a replacement vehicle during the period of lost use; that he did not have another vehicle available for use; that he hired a replacement vehicle to mitigate the loss of use of the damaged vehicle; that he entered into a

credit hire agreement with a third party, Call Robert, for the hire of a replacement vehicle; that the replacement vehicle was hired for a period of 29 days; that the pursuer "incurred hire costs in the sum of £6,264"; and that this sum is a reasonable estimate of the pursuer's loss and damage (Article 4).

[14] The pursuer avers that his vehicle was taken to a garage on 13 October 2023 where repairs were estimated; the parts required for the repairs to pursuer's vehicle were ordered on 13 October 2023; repairs to the vehicle were authorised the following day (14 October 2023); the parts arrived on 17 October 2023, with "additional required parts" arriving on 18 November 2023; repairs to the pursuer's vehicle were completed on 4 December 2023. Meantime, the pursuer avers that he required the vehicle for "social and domestic purposes"; that he was "impecunious" at the time of the accident; that on 30 October 2023 he entered into a "valid contract" with Call Robert for the hire of a replacement vehicle; that he is "liable to pay the hire charges as per the hire agreement"; that the pursuer does not challenge the validity of the hire contract; and that the hire contract is "valid and enforceable" (Article 4).

[15] Lastly, the pursuer avers that *esto* the hire contract is "deemed to be unenforceable" (which is denied), he avers that he "has lost the use of his own vehicle for 29 days". He estimates his loss at £6,264, calculated "on a reasonable hire charge of £180 per day plus VAT". No further detail is given.

[16] In his pleas-in-law, the pursuer asserts that he has suffered loss and damage through the fault and negligence of the defender, that he is entitled to reparation, and that the sum sued for is a reasonable estimate of his loss (pleas-in-law numbers 1 and 2). The pursuer also challenges the relevancy and specification of the defender's *esto* averments (plea-in-law number 3).

[17] For the defender, the causation, nature, and extent of any loss, injury or damage sustained by the pursuer are not known and not admitted. *Quoad ultra* the pursuer's averments are denied. The defender expressly avers that the pursuer has not suffered any loss of use and that the hire period is excessive. Calls are placed upon the pursuer to lodge the credit hire agreement and vouching for the credit hire charges; to specify why a replacement vehicle was required; to vouch the averment of impecuniosity; and to confirm the "full loss of use dates". A further line of defence is advanced. The defender avers that the credit hire agreement is "capable of subsisting for more than three months"; that its terms are regulated under the Consumer Credit Act 1974 ("the 1974 Act"); that the "providers" of the credit hire agreement have not fulfilled their duties in terms of the 1974 Act in respect that they are "not regulated by the Financial Conduct Authority to enter into such agreements"; that the credit hire agreement is "unenforceable" against the pursuer (and, in turn, against the defender); and that it has been more than 350 days since the date of the hire agreement.

[18] The defender's first plea-in-law is a general preliminary plea to relevancy and specification. The defender's second plea-in-law seeks to exclude averments from probation on the same grounds.

**The credit hire agreement**

[19] The pursuer avers that he entered into a credit hire agreement for the hire of a replacement vehicle (Article 4).

[20] A document bearing to be a credit hire agreement has been lodged in process by the pursuer (item 5/2 of process: pursuer's first inventory of productions, item 2). Its material terms are neither narrated in, nor expressly incorporated *brevitatis causa* into, the pleadings.

[21] That raises a technical difficulty. The document lodged in process does not form part of the pleadings. The relevancy of a party's pleadings cannot be tested by reference to an extraneous document.

[22] At debate, both parties referred to the lodged document but there was no concession or agreement that I could proceed to construe its terms or treat it as part of the pleadings. The pursuer insisted that the proper construction of the document was a matter for proof whereas the defender submitted that, absent averments of any relevant matrix, its proper construction was a matter for debate. Overall, it was an unsatisfactory position.

[23] In my judgment, absent disputed averments of any relevant factual matrix, the proper construction of a contract forming part of the pleadings is a question of law habile for debate. However, in this case, I am drawn reluctantly to the conclusion that the lodged document is extraneous to the pleadings, absent narration of its pertinent terms in averment, or incorporation *brevitatis causa*, or express agreement or concession by the parties that its terms can be construed at debate. That said, in deference to the parties' submissions, and in an effort to assist, I have set out my preliminary views on the proper construction of the agreement. That apart, certain other issues are capable of being determined at debate.

**Submissions at debate**

[24] Written submissions were lodged and adopted in support of the parties' preliminary pleas.

[25] For the defender, it was submitted that the pursuer's claim for payment of damages comprising hire charges "incurred" under the credit hire agreement was irrelevant because the credit hire agreement is not enforceable. The defender's submission ran as follows. As a matter of law the credit hire agreement between the pursuer and Call Robert is a regulated

consumer hire agreement; such agreements can only be entered into between a person regulated by the Financial Conduct Authority ("FCA") and a consumer; a regulated consumer hire agreement that is entered into by a person who is not an "authorised" or "exempted" person is unenforceable; Call Robert is not authorised by the FCA; no exemption is averred; therefore, the contract between the pursuer and Call Robert is unenforceable; accordingly, the pursuer has "incurred" no liability for hire charges and the action should be dismissed. Reference was made to the 1974 Act, section 15; FSMA 2000, sections 19, 22 and 26; the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the 2001 Order"); the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013 (SI 2013/1881); and *Dimond* v *Lovell* [2002] 1 AC 384. A consumer hire agreement is an agreement which *inter alia* is "capable of subsisting for more than 3 months" (1974 Act, section 15(1)(b)). Condition 2 of the Call Robert agreement states that the maximum hire period would not exceed "270 days from the date of the Agreement". Therefore, the agreement was said to be a regulated consumer hire agreement. It was only enforceable if Call Robert was "authorised" to carry out the regulated activity of entering into such agreements (1974 Act, section 15; FSMA 2000, sections 22 and 26; 2001 Order, Article 60N). Since Call Robert was not so authorised, the agreement was not enforceable against the pursuer, so no liability had been incurred. The speculation that Call Robert might be able to avail itself of a saving provision in FSMA 2000, section 28A, was irrelevant, until that provision was triggered.

[26] It was also submitted that the pursuer had failed to aver whether any payment had been made to Call Robert under the credit hire agreement, despite the passage of 3 years from completion of the hire. I was invited to interpret the pursuer's failure to answer the call as an implied admission that no payment had been made and to conclude that Call

Robert enjoys an unfettered discretion as to when (if ever) to demand payment, notwithstanding the purported express back-stop of 350 days for payment referred to in the agreement. The "back-stop" provision was "illusory". A credit hire agreement which permits repayment to be deferred indefinitely was said to fall outwith the exemption in the 2001 Order, Article 60F (*Zoan* v *Rouamba* 2000 1 WLR 1509; *Carabalona* v *Welsh* 1999 CLY 2476).

[27] Lastly, the pursuer's *esto* case was attacked as irrelevant. It was submitted that, on the face of the pursuer's own pleadings, the pursuer had not suffered any loss of use during the 29-day period because the pursuer evidently had use of the replacement vehicle during that period.

[28] For the defender I was invited to sustain the defender's first preliminary plea and to dismiss the action. Alternatively, I was asked to sustain the second plea-in-law, exclude from probation the pursuer's *esto* averments, and allow a proof before answer reserving the defender's first preliminary plea. I was also invited to repel the pursuer's third plea-in-law (which sought to exclude from probation the defender's averments regarding the enforceability of the credit hire agreement).

[29] For the pursuer, firstly, it was submitted that the hire agreement was valid, enforceable, and imposed a liability on the pursuer to pay the hire charges.

[30] Secondly, the absence of FCA authorisation (which was denied on the face of the pleadings) would not render such an agreement "unenforceable". Section 28A of the FSMA 2000 created a "saving" provision or power of validation. An agreement entered into by an unauthorised person was not "irredeemably unenforceable" (per *Dimond, supra*); it was merely "redeemably" unenforceable; it could be cured by written notice from the FCA. In this way, *Dimond* was said to be distinguishable. Even on the defender's disputed

analysis, it was said that the pursuer remained exposed to a real contingent liability to Call Robert to pay the hire charges.

[31] Thirdly, any alleged unenforceability could not avail the defender. Section 26, FSMA 2000 existed for the benefit of the pursuer as consumer, not for the benefit of the defender as wrongdoer. Even if section 26, FSMA 2000 disabled Call Robert from enforcing the agreement against the pursuer (as hirer), it conferred no right and no defence upon the defender (as a stranger to the contract). The defender, as the wrongdoer, cannot appropriate to itself the (qualified, curable, "redeemable") unenforceability that may exist between the pursuer and the owner so as to defeat a claim of reparation against the defender.

[32] Fourthly, any finding in this process as to the enforceability of the agreement would be *res inter alios acta*: it would bind neither Call Robert nor the FCA; it could foreclose neither an application by Call Robert under section 28A, FSMA, nor subsequent debt proceedings between Call Robert and the pursuer. For this reason, the defender's averments of unenforceability were irrelevant.

[33] Fifthly, the pursuer's "loss of use" was said to be recoverable independently of the credit hire agreement. The extinction of a contractual claim (between the pursuer and Call Robert), even if it had occurred, would not extinguish the delictual claim between the pursuer and the defender.

[34] Other miscellaneous points were addressed. First, the pursuer denied that the agreement was a regulated consumer hire agreement at all. Whether it was "capable of subsisting for more than 3 months" depended on the proper construction of various internally inconsistent clauses (concerning the permitted duration of hire and the number and timing of payments). The proper construction of the disputed contractual terms was said to be a matter for enquiry at proof, not debate. Second, the (disputed) fact that payment

had not yet been made was said to be "neutral". Deferral of payment pending the outcome of a claim was a defining feature of credit hire; it merely suspended liability; it did not result in the extinction of liability. Third, unanswered calls did not constitute implied admissions. Fourth, the regulatory status of Call Robert (specifically, whether that third party was authorised or exempted) was not within the pursuer's knowledge. These were questions of fact to be determined at proof.

[35] Lastly, the pursuer challenged the specification of the defender's averments regarding enforceability. No fair notice was said to have been given of the basis of that alleged unenforceability. Besides, only absence of authorisation was averred, not absence of exemption. Since both possibilities were not excluded, sections 19 and 26, FSMA 2000 were not engaged.

[36] For the pursuer, I was invited to sustain the pursuer's third plea-in-law and exclude from probation the defender's averments regarding the unenforceability of the credit hire agreement. *Quoad ultra*, I was invited to allow parties a proof before answer, reserving the defender's first preliminary plea.

**The law**

[37] In cases involving physical damage to moveable property caused by negligence, the normal measure of damages is the amount by which the value of the damaged property has been diminished. However, in the ordinary case, the cost of repairs is often taken as the *prima facie* method of ascertaining that diminution in value. The logic is that the cost of repair is the *prima facie* cost of putting the property into the same condition as it was before the damage was inflicted.

[38] A separate, well-recognised head of loss arising from negligent damage to moveable property is the ubiquitous claim for loss of use. In essence, a loss of use claim is a claim of damages for inconvenience (*Lagden* v *O'Connor* [2004] 1 AC 1067, [27], per Lord Hope; *Aarons & Co* v *Fraser* [1934] SC 137, [140], per Lord Justice Clerk (Aitchison). Inconvenience is a valid head of loss for both breach of contract and breach of delictual duty. In delict, such claims originated in ship collision cases, where the cost of hiring a substitute ship during a period of repair of a negligently damaged vessel was held to recoverable in principle (*The Greta Holme* [1897] AC 596; *The Mediana* [1900] AC 113; *Admiralty Commissioners* v *SS Susquehanna* [1926] AC 655). In modern times, it is the hire of substitute cars that most commonly illustrates this head of loss. For many years, the reported cases were concerned with perfectly ordinary hirings from conventional car hire companies *(Taylor* v *Ingram* 1947 SLT (Sh Ct) 2; *McLaughlin* v *Malcolm* 1965 SLT (Sh Ct) 70). Latterly, hirings from "credit hire" companies, which bring their own special features, have increased and, for all practical purposes, have overtaken conventional hirings.

[39] The proper approach to such loss of use claims is as follows.

[40] First, the onus lies on the claimant to aver and prove that he has suffered trouble and inconvenience (that is more than *de minimis*) by the deprivation or loss of use of the property. In many, if not most, cases, such inconvenience may not be difficult to infer from the circumstances. In this form, an award of damages for loss of use is akin to solatium. It compensates non-financial loss. It is in the nature of general damages, to use the English terminology. The precise quantification is a matter for the fact-finder. Damages are assessed in a summary manner. It is likely to be rough, ready, and impressionistic. No rigid rules apply. In the usual case, this "rough assessment" (*Aarons & Co* v *Fraser*, *supra*, 143) is likely to be at a modest level. Illustrations can be found in awards of damages for

inconvenience in *Taylor*, *McLaughlin* and *Aarons & Co, supra,* and even in *The Greta Holme*, where the House of Lords assessed damages summarily at £500 for loss of use of a damaged ship.

[41] Second, if the claimant (on whom the onus also lies) can establish a "reasonable necessity" or "justifiable need" (*Ali* v *HSF Logistics Polska sp z oo* [2025] 4 WLR 8, [16], per Stuart-Smith LJ) to hire a replacement vehicle, in order to avoid or mitigate the trouble and inconvenience caused by the wrongdoer's negligence, then the financial expense of doing so may then become the *prima facie* measure of the claimant's loss. In that event, the financial cost of hire will be substituted for the claim for non-financial loss of use by way of general damages (*Lagden*, *supra,* [27]).

[42] Importantly, the need for a replacement car is not self-proving (*Ali* v *HSF Logistics Polska sp z oo* [2025] 4 WLR 8). The onus lies on the claimant to establish a "reasonable necessity" or "justifiable need" to hire a replacement vehicle (*Ali, supra*, [16]). Proof of that need does not simply depend upon the fact that the claimant had a car which has been damaged; rather, it depends upon the claimant proving a need for transport which, as a matter of fact, he was satisfying by using his car until it was negligently damaged (*Ali, supra*, [15]). If, in truth, a claimant would have had no call to use a vehicle, and would not have done so, during the period that his own car was off the road (for example, because he was in hospital, or out of the country on holiday), then the cost of hiring a replacement vehicle would not be recoverable from the negligent party (*Ali,* [16]; *Lagden,* [27]). The key thing that a claimant has to prove is that, as a consequence of the negligence, he has suffered inconvenience which gives rise to a justifiable need for a replacement vehicle. In practice, in many cases, it may not be difficult to infer such a need. A motorist who incurs the expense of keeping a private car generally does so because he has a need for it (and, consequently,

may have a justifiable need to replace it, if it is put out of commission in an accident) (*Giles* v *Thompson* [1994] 1 AC 142, 167 per Lord Mustill). But it remains for the claimant to aver and prove that need (*Burdis* v *Livesey* [2002] EWCA Civ 510, para [147], per Aldous LJ).

[43] If such a need cannot be proved by the claimant, damages may be restricted to compensation for non-pecuniary loss (akin to solatium) for proven inconvenience in not having use of a car readily to hand, subject to a claim for ancillary financial losses such as out-of-pocket expenditure on public transport.

[44] Third, once the innocent party has established a justifiable need to hire a replacement car, the onus shifts to the defender to prove that the innocent party has failed to mitigate his loss. This may relate, for example, to the period of hire, or the charge-out rate, or the type of replacement vehicle, among other things.

[45] It is often said that the innocent party is under a "duty" to mitigate loss or to minimise damage. This expression is something of a misnomer because there is no actionable "duty" as such upon a claimant to accept a cheaper or different response to the calamity facing him. If the innocent party wishes to adopt a more expensive method, he is at liberty to do so. The true meaning of the "duty" to minimise loss is that the innocent party is not entitled to charge the defender, by way of damages, with any greater sum than that which he reasonably needs to expend for the purpose of making good his loss. The innocent party can be as extravagant as he pleases but not at the expense of the defender (*Darbishire* v *Warran* [1963] 1 WLR 1067, 1075 per Pearson LJ). The so-called duty to mitigate loss is, in effect, an accounting exercise, whereby the damages recoverable may be reduced by proof of reasonable mitigatory steps that ought to have been taken. The object of the principle is to prevent the innocent party recovering compensation for damage which is really self-inflicted

when, with reasonable effort, he could have avoided it (*Admiralty Commissioners* v *SS Chekiang* [1926] AC 637, 646 per Lord Sumner).

[46] The significant point is that the onus of proof is always on the defender (as the alleged wrongdoer) on the issue of mitigation. It is always for the defender to aver and prove that the claimant ought reasonably to have taken some other course of action or mitigatory step to minimise the loss now claimed.

[47] Aside from the issue of onus, there are also limits on the principle. The duty to mitigate is not absolute. The innocent party is only bound to take reasonable steps; he is not obliged to make extraordinary efforts; nor will the innocent party necessarily be penalised because he has failed to take the best possible course, or all possible steps, to minimise damages (*Gunter* v *Lauritzen* [1894] 31 SLR 359). The innocent party need not adopt a course which would mitigate damages but be harmful to his commercial credit, or business reputation, or destroy or injure his own property rights, or do anything outside the ordinary course of business. The actings of the innocent party will not be judged too strictly; he will not be faulted for any or every slight error of judgment; the damages recoverable will not be reduced merely because the defender can show, in the light of subsequent knowledge, that the innocent party's action was not the very best that might have been taken in the circumstances or that some alternative course of action might have been preferable. The wrongdoer is not entitled to criticise a course of action honestly taken by the injured person (*a fortiori* on the advice of experts) even though it should appear, in the light of later events, that another course of action might have saved loss (*Clippens Oil Co* v *Edinburgh Water Trustees* [1907] SC (HL) 9, 14). Lastly, where the innocent party finds himself, in consequence of a breach of duty by another, placed in a position of embarrassment, the measures which the innocent party may be drawn to adopt in order to extricate himself

"ought not to be weighed in nice scales at the instance of the party whose breach… has occasioned the difficulty" (*Banco de Portugal* v *Waterlow & Sons Ltd* [1932] AC 452, 506). The question of the reasonableness of alternative courses of action is one of fact in each case.

[48] Fourth, we then come to the knotty distinction between an ordinary hire and a credit hire of a replacement vehicle. This is merely an aspect of the duty to mitigate loss. Once a claimant has established a justifiable need for a replacement vehicle during the period of repair of his damaged vehicle, he may hire a substitute car from a conventional hire company (which will involve paying for the hire "up front") or he may enter into a credit hire agreement with a credit hire company (which would involve obtaining the hire car "on credit"). The credit hire has certain special features: first, most obviously, the hire is obtained "on credit"; second, the credit hire company will often assume the risk, trouble and expense of pursuing the wrongdoer for recovery of the hire charges in exercise of a contractual right of subrogation. As a result of these and other special features, the expense of hiring a vehicle from a credit hire company will generally be substantially more than the expense of hiring a vehicle from an ordinary car hire company. (In *Dimond*, for example, the daily "spot" rate for car hire was found to vary between £27.42 and £23.89, whereas the sum charged by the credit hire company was £43.33. In *Lagden*, the first instance judge found that the "spot" rates were about 70% less than the sums charged by the credit hire company.) In *Dimond*, the House of Lords (by a majority, and technically, in *obiter dicta*) established a normal rule that the value of the additional services or benefits obtained by hiring a replacement vehicle under a credit hire agreement will not generally be recoverable as damages for loss of use. Instead, in the normal case, the claimant's loss will be confined to the proven (cheaper) "basic hire rate" (or "spot rate", as it used to be called) that would have been chargeable locally for an ordinary hire from a conventional car hire company. This is

merely an aspect of the duty to minimise loss. The ordinary principles of mitigation apply. So, the onus lies on the defender, as the wrongdoer, to aver and prove that the claimant has failed to mitigate his loss, specifically, to demonstrate that the credit hire charges sought by the claimant exceed the basic hire charges locally available for an equivalent vehicle. Bear in mind, though, that in the absence of such proof, no assumption will be made that the claimed credit hire rate is excessive (*Allan* v *Amlin UK Ltd* 2014 SLT 75; *Pattni* v *First Leicester Buses Ltd* [2011] EWCA Civ 1384; *Bent* v *Highways & Utilities Construction* [2011] EWCA Civ 1384).

[49] Fifth, on a practical level, how is a defender to quantify the extent to which the claimant has allegedly failed to mitigate his loss by entering into a credit hire agreement? In other words, how is a defender to establish the value of the irrecoverable "additional" benefits that are said to have been enjoyed by reason of a claimant choosing a credit hire rather than an ordinary hire? The difficulty arises because credit hire companies do not routinely value such additional benefits. They quote and charge a single credit hire rate. The best that can be hoped for, absent a very expensive exercise of document recovery and forensic analysis wholly unsuited to most of these litigations, is a reasonable approximation. The English Court of Appeal has opined that evidence of the *lowest* reasonable rate quoted by a mainstream supplier for the (non-credit) hire of an equivalent vehicle is likely to be a reasonable approximation to the recoverable "basic hire rate". If faced with a range of such hire rates, the court should try to identify the rate or rates of hire in the claimant's geographical area for the same type of car. If that exercise yields a single rate, then that is likely to be a reasonable approximation for the basic hire rate. If, on the other hand, it yields a range of rates, then the lowest reasonable rate quoted by a mainstream supplier (or, if there is no mainstream supplier, by a local reputable supplier) would suffice as a reasonable

approximation. What should not be done is to take an average of these rates. Rather, the search must be for the lowest reasonable quoted rate (*Karl Stevens* v *Equity Syndicate Management Ltd* [2015] EWCA Civ 93). That English approach seems workable and sensible.

[50] Sixth, an exception applies to the normal rule in *Dimond* (that is, the normal rule that the claimant's loss will be confined to the proven "basic hire rate" that would have been chargeable for an ordinary hire by a conventional car hire company, rather than the credit hire rate for a credit hire chargeable by a credit hire company). If the claimant proves that he had a justifiable need for a replacement vehicle during the repair period; and if the claimant (on whom, on this particular issue, the onus also lies) proves that he could not afford to fund "up front" the hire costs for a substitute car from an ordinary car hire company, so that he was left with "no choice" but to obtain a replacement vehicle "on credit" from a credit hire company; then, in that event, the claimant will be entitled to recover the reasonable costs incurred under a credit hire agreement, notwithstanding that those costs are higher than proven locally-available ordinary car hire charges. This has come to be known as the "impecuniosity" exception established in *Lagden* v *O'Connor* [2004] 1 AC 1067. In *Lagden*, the House of Lords (again by majority) decided that common fairness dictated that if an innocent party, having been deprived of use of his vehicle by the negligent wrongdoer, proves that he was "impecunious" (in the sense that he had "no choice but to use the services of the credit hire company" and, as a result, had "no way of avoiding the additional benefits" that were provided to him under the credit hire agreement by reason of his impecuniosity), then the credit hire charges would be recoverable by him.

[51] What constitutes "impecuniosity" for this purpose? This question has generated brisk business in the sheriff courts and elsewhere. In *Lagden*, Lord Nicholls considered that impecuniosity signified an inability to pay car hire charges without "making sacrifices the

[claimant] could not reasonably be expected to make". He acknowledged this was a rather "open ended" test (para [9]). Lord Hope suggested that the test was whether the motorist was able to pay the cost of the basic hire rate up-front "without exposing himself or his family to a loss or burden which is unreasonable". As a rough rule of thumb, he thought the distinction between impecuniosity and pecuniosity would probably turn on whether the claimant had an acceptable credit card or debit card available to him. In *W* v *Veolia Environmental Services (UK) plc* [2011] EWHC 2020, an English judge was prepared to hold that the claimant, an actuary living in a good part of London, whose Bentley was negligently damaged, was impecunious, thereby allowing him to recover the higher credit hire charges incurred by him, because his finances were in a very poor state. In *Opoku* v *Tintas* [2013] EWCA Civ 1299, the trial judge was satisfied that the claimant had a tiny bank balance, quite large debts, and was therefore "impecunious". In contrast, in *Karl Stevens* v *Equities Syndicate Management Ltd*, *supra*, the claimant was held not to be impecunious, essentially on the basis that his bank statements disclosed "a significant positive balance" at all relevant times. Each case will turn on its own facts.

[52] It is worth repeating – the onus lies on the claimant to aver and prove that he was impecunious at the time he entered into the credit hire agreement, in order to bring himself within the *Lagden* exception. Since each case turns on its own facts, as a matter of fair notice, that ought to involve more than the ubiquitous bare averment of "impecuniosity".

[53] Lastly, seventh, what happens if a claimant, having established the need for a replacement vehicle and impecuniosity, hires a replacement car from a credit hire company, but the credit hire agreement is unenforceable under statute? In that scenario, can the claimant (or the credit provider exercising rights of subrogation through the injured party)

still recover damages from the negligent wrongdoer comprising the notional cost of the credit hire? The answer is no.

[54] In *Dimond* v *Lovell*, *supra,* Mrs Dimond, having a justifiable need for a substitute vehicle, hired a replacement under a credit hire agreement. However, it transpired that the credit hire agreement was unenforceable against her because it was not properly executed in terms of section 127(3) of the 1974 Act (now repealed). As a result, she had, somewhat fortuitously, incurred no "loss" because she had obtained the benefit of the replacement vehicle during the period when her own car was being repaired; the replacement car had been obtained on credit; she had never paid for it; the credit hire company was precluded from enforcing the charges against her; and, so, in a broad sense, she had obtained the replacement car "free of charge". In truth, though, she was no better off because the replacement car was merely the direct substitute for her damaged vehicle. As for the credit hire provider, it may well have been out of pocket, but there were wider public policy issues at play. The policy of the 1974 Act (in rendering unenforceable an improperly executed credit agreement) was to "penalise" the non-compliant credit provider and to protect the consumer (*supra*, 400C-D and 398A-B). This dual legislative policy was not to be circumvented by allowing the non-compliant third-party credit provider to recover indirectly from the negligent defender.

[55] Such a scenario is to be distinguished from cases where a credit hire agreement is enforceable but, as often happens, the claimant's liability thereunder is merely suspended or postponed to a later date or to the occurrence of a subsequent event. In those cases, the claimant has incurred a real legal liability under the agreement, albeit one that is properly characterised as contingent in nature (*Giles* v *Thomson, supra*; *Irving* v *Morgan Sindall plc* [2018] EWHC 1147).

[56] The present case involves this final (seventh) legal principle.

[57] The defender contends that the credit hire agreement is unenforceable; therefore, in law, the pursuer has "incurred" no legal liability under it (contingent or otherwise); therefore, he has suffered no "loss" in the form of the credit hire costs on which his damages claim is primarily predicated. In principle, this is a perfectly tenable line of defence.

[58] However, the practical difficulty that emerges for the defender is that the defence raises mixed issues of fact and law, only some of which are capable of being resolved at debate in this particular case.

**Reasons for decision**

***The pursuer's preliminary plea***

[59] I begin with the pursuer's preliminary plea. In averment, the defender disputes the enforceability of the credit hire agreement. The pursuer challenges the relevancy and specification of those averments (pursuer's plea-in-law number 3). As it was developed in submission, the defender's attack on the enforceability of the agreement runs along the following lines:

(i) on proper construction, the credit hire agreement is a "consumer hire agreement" in terms of section 15 of the Consumer Credit Act 1974;

(ii) specifically, the credit hire agreement is "capable of subsisting for more than 3 months", in terms of section 15(1)(b) of the 1974 Act;

(iii) entering into a consumer hire agreement as an owner is a "specified activity" in terms of chapter 14B, Article 60N of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the 2001 Order");

(iv) such a "specified activity" falls within the definition of a "regulated activity" in terms of section 22 of the Financial Services and Markets Act 2000 ("FSMA 2000");

(v) a person is prohibited from carrying on a "regulated activity" (including the "specified activity" as aforesaid) in the United Kingdom unless the person is either "authorised" to do so by the FCA or "exempted", in terms of section 19 of the FSMA 2000 (the so-called "general prohibition");

(vi) an agreement made by a person in the course of carrying on a regulated activity (including a "specified activity") in breach of the general prohibition is unenforceable against the other party, in terms of section 26, FSMA 2000;

(vii) therefore, in order for this consumer hire agreement to be enforceable, Call Robert requires to have been an "authorised" or "exempted" person when it entered into it with the pursuer;

(viii) in fact, Call Robert was not "authorised" by the FCA to enter into regulated consumer hire agreements when this agreement was executed;

(ix) the pursuer fails to aver that Call Robert was "exempted" from authorisation;

(x) therefore, in law, the credit hire agreement breaches the general prohibition and is unenforceable under statute (FSMA 2000, sections 22 and 26);

(xi) therefore, in law, the pursuer has not "incurred" any hire costs under the agreement;

(xii) therefore, the pursuer's primary averred head of loss (comprising "incurred hire costs") is irrelevant, so the action should be dismissed.

[60] In comparison, the defender's averments challenging the enforceability of the credit hire agreement are sparse. The defender avers only that the credit hire agreement is

"capable of subsisting for more than three months"; that its terms are "regulated" under the Consumer Credit Act 1974 ("the 1974 Act"); that the "providers" of the credit hire agreement have not fulfilled their duties in terms of the 1974 Act in respect that they are "not regulated by the Financial Conduct Authority to enter into such agreements"; and that the credit hire agreement is "unenforceable" against the pursuer (and, in turn, against the defender).

[61] In debate, the pursuer insisted that these averments lacked specification of the basis of alleged unenforceability and that they were, in any event, irrelevant.

[62] While I have sympathy for the pursuer's specification criticism, I conclude that the defender's averments regarding unenforceability, while threadbare, are sufficient to pass the threshold of adequate specification. Though sparse, the defender's averments give sufficient fair notice of the essential factual issues in dispute (or, perhaps more correctly, of the mixed issues of fact and law in dispute), namely, that the credit hire agreement is "capable of subsisting for more than three months" (an essential component element of the definition of a regulated consumer hire agreement); that the credit provider (Call Robert) has "not fulfilled [its] duties" under statute in respect that it is not "regulated" (which can reasonably be understood to mean not "authorised") by the FCA "to enter into such agreements"; and that, as a result, the agreement is unenforceable. In broad terms at least, those pleadings flag up the propositions raised in paragraphs (i), (ii), (v), (vii), (viii), (x) and (xi) of the defender's more developed argument, as summarised above. The remaining paragraphs of the defender's challenge are of the nature of legal submissions, which would not require (and indeed ought not) to be narrated in the pleadings anyway. Besides, no material prejudice has been suffered by the pursuer as a result of the defender's scant averments on

unenforceability because the full legal argument is developed in the written note of arguments lodged in advance of the debate.

[63] I also conclude that the defender's averments regarding unenforceability are relevant. By direct analogy with *Dimond*, if the credit hire agreement is indeed unenforceable under statute, then it follows, in law, that the pursuer has would have "incurred" no liability for the "hire costs" now claimed against the defender; no financial "loss" as averred would have been sustained; so, the pursuer's primary head of claim would be irrelevant (see paras [53] and [54], above).

[64] The pursuer advanced a number of attractive arguments to seek to distinguish *Dimond*. I was not persuaded by any of them.

[65] First, the pursuer argued that the present claim is delictual and did not depend upon the enforceability of the credit hire agreement. While it is correct that the claim is delictual in nature, not contractual, the pursuer has nevertheless shackled his primary claim to the credit hire agreement by choosing to quantify his "loss" in the form of an alleged legal liability for hire costs "incurred" thereunder. His primary claim is for a "substituted" financial loss (or special damages, to use English terminology) (*Lagden*, [27], per Lord Hope) in place of a general award of damages for inconvenience. The enforceability of that agreement is, therefore, critical to the existence of the averred financial loss.

[66] Second, the pursuer argued that a different statutory provision (now repealed) applied in *Dimond*. That is correct. Different statutory provisions now apply (FSMA 2000, sections 22 and 26). But the legal consequence (namely, unenforceability under statute) is the same.

[67] Third, the pursuer submitted that, in *Dimond*, the credit hire agreement was "*irredeemably* unenforceable" in terms of section 127(3) of the Consumer Credit Act 1974

(now repealed) whereas, in the present case, the absence of FCA authorisation would, at worst, render this agreement "*redeemably* unenforceable". The alleged unenforceability was said to be merely "redeemable" because any lack of authorisation was capable of being cured and validated by written notice from the FCA, in terms of section 28A, FSMA 2000. The terminology finds some support in *Parker* v *Skyfire Insurance Company Ltd & Spectra Drive Ltd* [2024] EWHC 1060. But I was unpersuaded by the logic. *Parker* is an English "Google-spoofing" case. It involved an averment by the defendant that the credit hire contract between the claimant and the third-party credit hire company was voidable at common law by reason of misrepresentation. That is a different situation from the present case where the agreement is allegedly unenforceable by statute. At common law, a void contract is void *ab initio*; at common law, a voidable contract is valid, until avoided; but a contract deemed unenforceable by statute (such as by section 26, FSMA 2000) is unenforceable, unless and until it is rendered enforceable by the triggering of some statutory relief provision (such as by the issuing of an FCA written notice under section 28A, FSMA 2000). The existence of such a statutory relief provision does not create a hybrid legal category of "redeemable" unenforceability. The confusion seems to have arisen from Lord Hoffman's description of the credit agreement in *Dimond* as being "irredeemably unenforceable" (*supra*, 397). From this, the pursuer seeks to create a new legal category of "redeemable unenforceability". There is no such thing in law. In *Dimond*, the use of the adjective "irredeemably" was merely intended to add emphasis. In the present case, the defender offers to prove that the credit hire agreement is statutorily unenforceable under section 26, FSMA 2000 for the reasons set out in its averments. That is a relevant defence, if the component factual elements are proved. In contrast, the pursuer does not offer to prove the triggering of any statutory relief provision (under section 28A, FSMA 2000 or otherwise).

Therefore, it cannot be said that any unenforceability has been cured, validated or "redeemed".

[68] Accordingly, the pursuer's preliminary plea (challenging the relevancy and specification of the defender's averments on unenforceability) falls to be repelled.

***The defender's first preliminary plea***

[69] I turn to consider the defender's preliminary plea to the relevancy of the pursuer's pleadings. The pursuer's claim for damages for loss of use is formulated in two ways. In the first place, he avers that his car was negligently damaged by the defender's insured; that he needed a replacement vehicle for 29 days while his damaged car was being repaired; that he was impecunious; that he hired a replacement vehicle on credit; that he "incurred hire costs" of £6,264 under the credit agreement; and that those hire costs represent his loss. In the second place, he avers that, *esto* the credit hire agreement is unenforceable, nevertheless he still "lost the use of his vehicle for 29 days"; and he estimates that loss at £6,264, calculated on the basis of a "reasonable" hire charge of £180 per day plus VAT.

[70] In my judgment, these averments lack adequate specification. On the face of the pleadings, (i) there is no specification by the pursuer of his alleged "need" for a replacement vehicle; (ii) there is no specification of the start and end dates of the "29 day" period of hire (a point of some puzzlement as the accident occurred on 10 October 2023 and repairs were completed on 4 December 2023, resulting in a 55-day window within which, at some unspecified stage, the 29-day period of hire is said to have occurred); (iii) there is no specification of the pursuer's alleged "impecuniosity"; and (iv) there is no specification of the factual basis of the averred "reasonable" daily hire rate of £180 plus VAT in the pursuer's *esto* claim.

[71] However, none of these specification points was taken at debate. (Points (i) and (iv) are adverted to in the defender's rule 22 note, but they were not argued and were sought to be reserved for proof.)

[72] Instead, at debate, the defender's primary submission was that the pursuer's averments were irrelevant because the credit hire agreement was unenforceable under statute.

[73] The practical difficulty for the defender is that, while, in principle, the alleged unenforceability of the credit hire agreement provides a perfectly tenable line of defence to the primary loss of use claim, it is not a defence that can be determined at debate *in this particular case* due to the terms of the pursuer's pleadings. A proof before answer is required. The alleged unenforceability of the agreement is founded upon a series of propositions comprising mixed issues of fact and law. On the face of the pursuer's pleadings, at least one of these key factual issues is disputed. Disputed factual issues cannot be resolved at debate. Evidence is required at proof.

[74] The twelve broad propositions on which the unenforceability defence is founded are summarised at para [59], above. Most of these propositions are legal in nature and could readily be determined at debate. However, proposition (viii) is a sharp issue of fact (namely, whether, at the date of the credit hire agreement, Call Robert was "authorised" by the FCA to carry on the regulated activity of entering into consumer hire agreements). On the face of the pursuer's pleadings, this factual issue is disputed. (It is covered by the pursuer's catch-all general denial in Article 4.) At the outset of the debate, the defender's counsel expressed dismay that the pursuer had not been prepared to concede this simple factual issue for the purposes of the debate. I share that disappointment.

[75] A further technical difficulty arises for the defender. The pursuer neither narrates the material terms of the credit hire agreement in his averments nor incorporates them into his pleadings *brevitatis causa.* (The defender took no issue with the absence of narrated or incorporated contract terms in the pleadings. Instead, the defender's challenge was directed at a different issue: the (disputed) non-authorisation of Call Robert by FCA.) Absent such narration *in gremio,* or incorporation *brevitatis causa*, the document lodged in process is, technically, extraneous to the pleadings. It is simply an adminicle of evidence at proof. It cannot be used to bolster or attack the relevancy or specification of the pleadings. Macphail, *Sheriff Court Practice* (4th Edition), paragraph 13.06, states:

> "Where it is proposed to ask the sheriff at debate to make a decision on the basis not only of the pleadings but also of the provisions of a document or documents, that can only be achieved in one of the following ways: (1) where the critical provisions have been quoted *verbatim* in the pleadings; (2) where the critical provisions have been accurately specified in the pleadings and have been expressly incorporated and held as repeated therein *brevitatis causa*, the document or documents having been lodged in process; (3) where neither of these courses has been followed in the drafting of the pleadings, a joint minute must be lodged dispensing with probation of the document or documents and, if necessary, agreeing copies as principals. The sheriff cannot consider a document at debate unless one of these courses has been adopted".

In practice, parties often agree at debate that the court can refer to and construe an extraneous document (usually a contract) for the purpose of determining a preliminary plea. However, no such concession was made by the pursuer in the present case. (Indeed, the pursuer would not even agree the order of the unnumbered pages in the lodged document.) At debate, the pursuer insisted on proceeding to proof *inter alia* to establish the terms, meaning, and enforceability of the credit hire agreement. As a result, I was compelled to consider the relevancy of the pursuer's pleadings within the four corners of the record.

[76] In summary, the defender sought a ruling at debate (i) on the proper construction of a document (bearing to be the credit hire agreement) that does not form part of the

pleadings and (ii) on a question of statutory enforceability that turns, in part, upon a material disputed issue of fact. I am not at liberty to give a ruling on either issue at debate. Instead, a proof before answer is required on both issues.

***The defender's second preliminary plea***

[77] The pursuer advances an alternative loss of use claim. He avers that, *esto* the credit hire agreement is "deemed to be unenforceable", he has still "lost the use of his own vehicle for 29 days". He quantifies his loss in the same sum of £6,264, by reference to a "reasonable" daily hire charge of £180 per day plus VAT.

[78] The defender did not attack the specification of these *esto* averments. Instead, the *esto* averments were said to be irrelevant. I agree. On the face of the pursuer's *esto* pleadings, self-evidently, he has suffered no "loss of use" at all during the 29-day period because he had use of the replacement hire vehicle from Call Robert. The pursuer cannot have his cake and eat it. He cannot have the use of a replacement vehicle and also seek damages for loss of use of a vehicle for the same period. Otherwise, the pursuer would obtain a double recovery.

[79] Conceivably, if the replacement vehicle were averred and proved to have been inferior, in some material respect, to the claimant's damaged car, a general award of damages for loss of use might yet be available. But that is not the case here. There are no such averments of non-equivalence in the pursuer's pleadings.

[80] Besides, the policy of the law in a case of this nature is to disallow recovery of damages comprising purely "notional" hire costs that have not actually been "incurred" when a credit hire agreement is deemed unenforceable under statute (*Dimond, supra*). The *esto* claim is expressly predicated upon the credit hire agreement being deemed

unenforceable. On this hypothesis, the pursuer has suffered no loss: he had the benefit and use of the replacement car for the entire period of hire; and he has incurred no legal liability for hire costs under the unenforceable agreement. In contrast, Call Robert (as the credit hire provider) may well be out-of-pocket, but by direct analogy with *Dimond*, the risk and financial consequences of unenforceability must fall at the feet of the credit hire provider. That is because, as in *Dimond*, the purpose of the "general prohibition" (per section 22, FSMA 2000) is to protect the consumer and to penalise the non-compliant third-party credit hire provider. To allow the pursuer to recover what are, in effect, purely "notional" costs for the unenforceable period of hire would undermine those legislative purposes of consumer protection and penalisation. It would also confer a windfall on the pursuer by compensating him for a "loss of use" he has not actually suffered. Therefore, the pursuer's *esto* averments are irrelevant and fall to be excluded from probation.

**Preliminary views on construction and enforceability of the agreement**

[81] For the reasons explained above, it is not open to me at debate to reach a final adjudication upon (i) the proper construction of the credit hire agreement (item 5/2 of process) or (ii) the enforceability of the agreement under statute. Evidence is required at proof on certain disputed factual issues. However, in deference to the careful submissions of parties on these issues, I offer the following strictly preliminary views on both issues.

[82] First, section 15 of the Consumer Credit Act 1974 defines a "consumer hire agreement" as follows:

> "(1) A consumer hire agreement is an agreement made by a person with an individual ('the hirer') for… (in Scotland) the hiring of goods to the hirer, being an agreement which –
> (a) is not a hire purchase agreement and
> (b) is capable of subsisting for more than three months."

[83] Second, on a proper construction of the credit hire agreement in this case (item 5/2 of process), it does indeed fall within the definition of a "consumer hire agreement" in section 15 of the 1974 Act. Adopting a natural and ordinary reading of the document, it is an agreement with an individual (the pursuer) for the hiring of goods (a car) to the individual hirer which is not a hire purchase agreement and which is "capable of subsisting for more than three months". It was this latter component element of the definition that was the focus of the controversy between the parties. Is the agreement "capable of subsisting for more than three months"? My preliminary answer is yes.

[84] To explain, the agreement is comprised of seven pre-printed *pro forma* pages, all unnumbered; blank spaces appear on some of these pages; some of the blanks are completed with handwritten insertions.

[85] The first page of the document is entitled "Hire Agreement"; it names Call Robert as the owner and the pursuer as the hirer; it identifies the hire vehicle; and it specifies a "daily charge" of "£180 per day". It makes no reference to the duration of the hire. If matters were left there, the period of hire would be open-ended; the hire would run from day to day (continuing, perhaps, for months or years) at the agreed daily rate, terminable, by implication of law, by either party giving reasonable notice. It would, therefore, be an agreement that was "capable of subsisting" for more than 3 months.

[86] The period or duration of the hire is expressly referred to on only two pages - the second and seventh pages. On the former, there is a clear and unambiguous statement as to the duration of the hire; on the latter, there is an unclear and ambiguous reference to duration.

[87] The second page contains various conditions on which Call Robert and the hirer "agree". Condition 2 states: "The hirer has requested and Call Robert has agreed to provide a replacement vehicle to the hirer for a period, which will not exceed 270 days from the date of this Agreement". The position could not be clearer. This condition 2 envisages that the period of hire may endure for up to 270 days. Self-evidently, it follows that the agreement is "capable of subsisting" for more than 3 months (ie 90 days), in terms of the 1974 Act, section 15. Interestingly, consistent with that interpretation, condition 2(b) on the second page also records that at the date of the agreement "there is no estimate of the length of time that the hirer will need this vehicle." All this points to an agreed, open-ended period of hire, continuing from day to day, capable of subsisting for more than 3 months, but not to exceed 270 days.

[88] In contrast, the seventh page also makes two references to the duration of hire, but in terms that are far less clear. Firstly, in a box in the left-hand column, the document states: "The anticipated period of hire is [*blank*] days". In other words, the period of hire is not defined here; it is left blank. That would be consistent with condition 2(b) (on the second page) that there is "no estimate" of the length of time that the hirer will need the vehicle. Secondly, however, another box within the left-hand column states:

> "This Hire Agreement is made on:
> [*blank*]
> Between the Owner and the Hirer for the hire of the Vehicle for the period from the date of this agreement until the 'Return Date' (being a date less than 80 days after the return of this Agreement) when the Hirer makes the vehicle available for collection (the 'Hire Period') by the Owner. In consideration of the agreement by the Owner to allow the Hirer to hire the vehicle for the Hire Period, the Hirer promises to pay the charges set out in the right hand column of the Agreement together with the cost of any premium payable in respect of insurance (the 'Hire Charges'). This Agreement is subject to eh [*sic*] conditions of hire set out overleaf".

This wording is opaque. It omits the date on which the agreement is made. It then seeks to define the "Hire Period" by reference to an obscure "Return Date" (when the hirer makes the vehicle available for collection) but which is said to be "less than 80 days after the *return of this Agreement*" (my emphasis). The wording, if intelligible at all, is uncertain; the meaning of the phrase "the return of the Agreement" is obscure (and is not illuminated by any averment by the pursuer of a relevant factual matrix); and the reference to an 80-day hire period flatly contradicts the maximum 270-day hire period in the preceding condition 2 on the second page.

[89] Happily, the conflict is easily resolved by reference to the usual canons of contractual construction. Firstly, the starting point is to apply the natural and ordinary meaning of the words used. The hire period stated in condition 2 on the second page (ie a maximum period of 270 days) is unequivocal. In contrast, the wording on the seventh page is unclear and ambiguous. The former should therefore be given effect. Secondly, if a clause is ambiguous, it should be construed strictly against the party who drafted it (in this case, Call Robert) (the *contra proferentem* principle of construction). Thirdly, and most significantly, the agreement itself neatly specifies an order of preference which allows the conflict between the wording on the second and seventh pages to be reconciled. The seventh page expressly states that the Agreement: ".. is subject to eh [*sic*] conditions of hire set out overleaf". The legal effect of this sentence is that the (rather obscure) wording on the seventh page is expressly rendered subordinate to the (much clearer) conditions on the preceding second page. That is a perfectly common contractual device. The wording of the detailed conditions on the second page (clearly specifying a maximum 270-day period of hire) over-rides the obscure and incomplete wording in the boxes on the seventh page. The upshot is that the agreed period

of hire is not to exceed 270 days (per condition 2 on the second page). As a result, the credit hire agreement is "capable of subsisting" for more than 3 months (1974 Act, section 15).

[90] That being so, certain legal consequences cascade naturally from this conclusion.

[91] First, it follows, in law, that this credit hire agreement, on which the pursuer's claim is founded, is indeed a "consumer hire agreement" in terms of section 15 of the 1974 Act. Second, entering into a consumer hire agreement, as owner, is a "specified activity", in terms of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013 (SI 2013/1881) and chapter 14B, Article 60N of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. Third, "regulated activities" are defined as including "specified activities" (FSMA 2000, section 22). Fourth, there is a "general prohibition" on the carrying on of a "regulated activity" in the United Kingdom unless Call Robert, as the person doing so, is either an FCA "authorised" or "exempted" person, in terms of section 19, FSMA 2000. Fifth, the defender offers to prove that, as a matter of fact, Call Robert was not authorised by the FCA when this credit hire agreement was entered into. (This is denied by the pursuer, hence the requirement for evidence at proof.) Sixth, no exemption from authorisation is averred by the pursuer. (The onus would lie on the pursuer to do so.) Lastly, seventh, if it were established at proof that Call Robert was not FCA-authorised at the relevant time, then it would follow, in law, that the credit hire agreement is indeed unenforceable (FSMA 2000, section 26); that the pursuer has "incurred" no legal liability under it; and that no financial "loss" of the nature claimed by the pursuer has been suffered (*Dimond, supra*). These are preliminary views only.

**The court's order**

[92] Meantime, for the reasons explained above, I have repelled the pursuer's preliminary plea (challenging the specification of the defender's averments concerning the unenforceability of the credit hire agreement). I have sustained the defender's second preliminary plea-in-law to the extent of excluding from probation the pursuer's *esto* averments in Article 4. *Quoad ultra* I have allowed parties a proof before answer of their respective remaining averments, restricted to issues of causation and quantum (including the enforceability of the credit hire agreement) in respect that liability is admitted, reserving the defender's first preliminary plea.

[93] For the avoidance of doubt, the proof will extend to the panoply of (relatively crisp and focussed) disputed factual issues in the pleadings including (i) whether the pursuer had a justifiable need for a replacement vehicle; (ii) whether the credit hire agreement was entered into between the pursuer and Call Robert; (iii) whether the pursuer was impecunious at the date of entering into that agreement; (iv) the terms of the credit hire agreement, and, by extension, whether it is a regulated consumer hire agreement, being one that is capable of subsisting for more than 3 months (1974 Act, section 15); (v) whether Call Robert (the credit provider) was authorised by the FCA to enter into such agreements at that time; and (vi) the quantification of the hire charges allegedly incurred.

[94] To maintain momentum, I have assigned a proof before answer. The outstanding disputed factual issues are straight-forward. A 1-day diet ought to be sufficient if the pre-proof timetable is obtempered. The issue of expenses is reserved meantime.